No. 75-1539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

BOARD OF OPTOMETRY, STATE OF CALIFORNIA, *Appellant*

v.

CALIFORNIA CITIZENS ACTION GROUP, ET AL., *Appellees*

On Appeal from the United States District Court, Central District of California

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MOTION OF THE AMERICAN OPTOMETRIC ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT, WITH BRIEF ATTACHED

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

13946-4-76

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The American Optometric Association hereby moves for leave to file the attached brief amicus curiae in support of appellant's jurisdictional statement. The basis for this motion is the following:

1. Appellant has given its written consent (which we have lodged with the Clerk) to the filing of such a brief. Appellees have withheld consent, thereby making this motion necessary.

2. The American Optometric Association, a non-profit membership organization incorporated under

the laws of the State of Ohio, is a national professional association of more than 19,000 members consisting of licensed Doctors of Optometry, optometry students, and educators. The objects of the Association, as set forth in its Constitution, "are to improve the vision care and health of the public and to promote the art and science of the profession of optometry."

3. A Doctor of Optometry is a primary provider of vital health care services who examines, diagnoses and treats conditions of the vision system. He is specifically educated, trained and licensed to examine the eyes and related structures to determine the presence of vision problems, eye disease or other abnormalities. Where appropriate, he prescribes and may dispense and adapt lenses or other optical aids and may use vision training or other methods of treatment to preserve or restore maximum efficiency of vision.

4. As the national professional organization representing the optometric profession, the Association has been, and is, vitally interested not only in legislation which seeks to improve the practice and standards of the profession itself, but also in legislation intended to assure to the public the availability of competent vision care and quality ophthalmic materials and to protect the public against deception and improper practices by any eye care provider. The Association also has been, and is, vitally interested, from a national perspective, in important litigation involving challenges to the validity of such legislation—particularly where, as here, validity is challenged on federal constitutional grounds and the implications of the case are national in scope.

5. The American Optometric Association, with the consent of the parties, participated as amicus curiae in

this Court in *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483 (1955), filing a brief and arguing orally before the Court. And in *Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), the Association filed a brief amicus curiae, the Court having granted the Association's motion for leave to file such a brief.

For the foregoing reasons, the motion for leave to file the attached brief amicus curiae should be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR AMERICAN OPTOMETRIC ASSOCIATION, IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

THE INTEREST OF THE AMERICAN OPTOMETRIC ASSOCIATION

The interest of the American Optometric Association is set forth in the Association's motion for leave to file this brief amicus curiae in support of appellant's jurisdictional statement.

ARGUMENT

The preliminary injunction granted by the 2-to-1 vote of the district court, totally enjoining the California State authorities from enforcing those portions of California's statutes which prohibit advertising the

price of eyeglasses, constituted a gross abuse of discretion. Indeed, the circumstances furnish a showing far more compelling than what will usually suffice, under this Court's Rule 15(g), for reversal of interlocutory injunctions improvidently granted.

The sensitive and important area of health care services—with all the attendant problems of assuring to the public competent professional services and of protecting the public against deception and improper practices—is an area which traditionally has been regulated by the States. Nevertheless, the district court majority here chose to enjoin a California statutory framework which has been in continuous operation for over thirty years. The district court majority did this abruptly and peremptorily—without taking evidence and without permitting the taking of evidence which was readily available and which would have shown the important reasons why the duly constituted California State authorities deemed the continuation of the long-standing California statutory framework to be essential to protecting the California public.

In addition, the district court majority granted this preliminary injunction—preventing the enforcement of legislation enacted by the representatives of all the people of California—solely at the behest of the four named individual plaintiffs. These four are California residents who (as the district court described them) "suffer certain optical infirmities which require that they wear prescriptive eyeglasses". What, then, is the irreparable injury they might suffer if they were required to wait until the entry of final judgment one way or the other at the end of the litigation? It is perfectly evident that the only "hardship" even arguably present is that, meanwhile, they might have to

make a few local telephone calls in the event that, during such period, they really wanted a new eye examination to decide whether a new prescription was called for and really were interested in learning more about comparative prices for such services. In other words, the case is a classic illustration of no irreparable injury whatsoever to these plaintiffs.

Moreover, the district court majority entered its preliminary injunction despite prior decisions of this Court expressly sustaining the broad regulatory authority of the States in this very area. These decisions not only have not been overruled or qualified by this Court; they have recently been cited by this Court with approval and respect (see note 3, below).

From every one of these standpoints, the district court majority abused its discretion by granting the preliminary injunction. In the aggregate, it was an abuse rising to enormous dimensions. As a result, the appeal raises questions of far-reaching importance relating to the public health and welfare and to our system of federalism.

As we have said, this appeal directly involves the rights of the States to regulate the delivery of health care services and materials. It directly affects the public health and welfare. In the overwhelming majority of the States, price advertising of optometric services and materials is regulated by State statutes or by regulations adopted by State agencies. In many of those States there is a strong body of opinion that such advertising leads to results which are highly detrimental to the consuming public. As this Court has expressly recognized, such statutes were enacted to protect the public health and welfare. *Williamson* v. *Lee*

Optical of Oklahoma, 348 U.S. 483 (1955); *Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963); *Wall* v. *Hardwick*, No. 74-194, 419 U.S. 888 (1974); see also *Semler* v. *Dental Examiners*, 294 U.S. 608 (1935).

Such state laws have been in existence for many years; they have been sustained not only by this Court in the decisions just cited, but also by numerous state courts.[1]

In *Williamson* this Court sustained the constitutional validity of such a State statute as applied to the advertising of the sale of frames by opticians, holding that the statute did not violate the Due Process or Equal Protection Clauses of the Constitution. There the Court said (348 U.S. at 490): "An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation, as Judge Murrah said in his dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. . . We see no constitutional reason why a State may not treat all who deal with the human

[1] *Louisiana State Board of Optometry Examiners* v. *Pearle Optical*, 248 La. 1062, 184 So. 2d 10 (1966); *Economy Optical Co.* v. *Kentucky Board of Optometric Examiners*, 310 S.W.2d 783 (Ky. 1958); *Ullom* v. *Boehm*, 392 Pa. 643, 142 A.2d 19 (1958); *Norwood* v. *Paranteau*, 75 S.D. 303, 63 N.W.2d 807 (1954); *Klein* v. *Department of Registration and Education*, 412 Ill. 75, 105 N.E.2d 758 (1952), certiorari denied, 344 U.S. 855 (1952); *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S.E.2d 210 (1945); *Melton* v. *Carter*, 204 Ark. 595, 164 S.W.2d 453 (1942); *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N.E.2d 378 (1940); *Bennett* v. *Indiana State Board of Registration and Examination in Optometry*, 211 Ind. 678, 7 N.E.2d 977 (1937); *Seifert* v. *Buhl Optical Co.*, 276 Mich. 692, 268 N.W. 784 (1936); *Texas Optometry Board* v. *Lee Vision Center, Inc.*, 515 S.W.2d 380 (Tex.Ct.of App. 1974).

eye as members of a profession who should use no merchandising methods for obtaining customers."

In *Head*, this Court upheld New Mexico's statutory prohibition against price advertising of eyeglasses. In ruling that this did not violate the Due Process or Commerce Clauses of the Constitution, the Court said (374 U.S. at 428-429): "the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established. *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483." The Court also held that the statute did not violate the privileges and immunities of national citizenship, and that it was not preempted by the Federal Communications Act, stating that "we cannot believe Congress has ousted the States from an area of such fundamentally local concern" (374 U.S. at 432). A contention that there was an invalid restraint on freedom of speech protected by the Fourteenth Amendment was not expressly considered because it had not been properly presented (374 U.S. at 432 note 12).

Thus the prior decisions of this Court involving optometry statutes have upheld their constitutional validity. As *Head* recognized (374 U.S. at 426), the purpose of such legislation has been to "protect . . . citizens against the evils of price advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes". But here the district court majority rode roughshod over these established principles of law by indulging in a speculative—and, we submit, almost certainly incorrect—prognosis concerning what will be the ultimate reach of develop-

ments giving a degree of First Amendment protection to certain aspects of what currently is sometimes referred to as "commercial speech".[3]

In issuing a preliminary injunction based somewhat mysteriously on such extreme speculation, the district court majority relied on this Court's decision only last term in *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). Yet the district court majority totally overlooked the fact that in that very *Bigelow* decision this Court said (421 U.S. at 825 note 10):

> We have no occasion, therefore, to comment on decisions of lower courts concerning regulation of advertising in readily distinguishable fact situations. . . . In those cases there usually existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating. . . .

[3] The fact that, in a wide variety of contexts, the First Amendment does not immunize "commercial speech" against legitimate Governmental regulation or prohibition is established by a long line of decisions of this Court, including some of very recent vintage. See, for example, *Associated Press* v. *United States*, 326 U.S. 1 (1945) (antitrust violations); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972) (same); *Donaldson* v. *Read Magazine*, 333 U.S. 178, 192 (1948) (prohibition against using mails for fraudulent advertising); *Pittsburgh Press* v. *Human Relations Commission*, 413 U.S. 376 (1973) (unlawful help-wanted advertisements based on sex discrimination); *United States* v. *Reidel*, 402 U.S. 351 (1971) (prohibition against business of selling obscene materials through the mails); *California* v. *LaRue*, 409 U.S. 109 (1972) (prohibition against certain types of entertainment in places where liquor is sold); *N.L.R.B.* v. *Virginia Electric & P. Co.*, 314 U.S. 469 (1941) (coercive management speeches are unfair labor practice); *Capital Broadcasting Company* v. *Mitchell*, 333 F.Supp. 582 (D.D.C., 1971), affirmed sub nom. *Capital Broadcasting Company* v. *Acting Attorney General* and *National Association of Broadcasters* v. *Acting Attorney General*, 405 U.S. 1000 (1971) (prohibition of cigarette advertising on radio and television).

> Our decision also is in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity. See *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, 414 U.S. 156 (1973); *Head* v. *New Mexico Board*, 374 U.S. 424 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955); *Barsky* v. *Board of Regents*, 347 U.S. 442 (1954); *Semler* v. *Dental Examiners*, 294 U.S. 608 (1935).[3]

A word should be added concerning the pending cases involving State laws restricting the advertising of prescription drugs. The district court majority referred to the Virginia case, *Virginia Citizens Consumer Council, Inc.* v. *State Board of Pharmacy*, No. 74-895, in which this Court had then noted probable jurisdiction; the case has subsequently been argued and, as this brief is written, is awaiting decision by this Court. It referred also to a comparable California case, *Terry* v. *California State Board of Pharmacy*, 395 F. Supp. 94 (N.D. Cal. 1975), now pending on appeal in this Court on a jurisdictional statement, No. 75-336 and presumably being held to await the Virginia decision. But however the prescription drug matter is decided, it is evident that reversal of the present case is called for. If the Virginia prohibition against advertising the price of prescription drugs is sustained, then it would clearly follow, a fortiori, that the California statute prohibiting advertising the price of eyeglasses must be upheld. But even if in the Virginia case the prohibition

[3] In addition to these references in the *Bigelow* opinion, it should be noted that this Court has also referred to *Williamson* and *Head* with approval in other recent decisions such as *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, 414 U.S. 156, 167 (1973); *California* v. *LaRue*, 409 U.S. 109, 116 (1972); *Geduldig* v. *Aiello*, 417 U.S. 484, 495 (1974); *Miller* v. *California*, 413 U.S. 15, 32 note 13 (1973); *Kelley* v. *Johnson*, No. 74-1269, decided April 5, 1976.

against advertising the price of prescripton drugs were to be stricken down, the differences between that situation and the vision-care situation are sufficiently far-reaching and substantial so that the California statutes involved in this case should be sustained. Long history and experience have established that the furnishing of prescription eyeglasses—which are custom-tailored to the vision needs of the particular individual—is in the context of rendering individualized health services furnished by eye-care providers. Those activities are subject to extensive regulation by the State in order to protect the public interest. Unless the essence of this Court's prior decisions is to be totally ignored, it follows that in those jurisdictions where, as in California, a legislative judgment has been made that the public interest requires a prohibition on such advertising, the prohibition is a valid exercise of State power and, as such, does not intrude on the First Amendment as reasonably and sensibly construed.

CONCLUSION

For the foregoing reasons, in addition to those set forth in the appellant's jurisdictional statement, the judgment granting the preliminary injunction should be reversed.

Respectfully submitted,

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